IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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No. 73-1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS FOR SEPARATION OF CHURCH AND STATE,

*Appellants,*

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

*Appellees,*

and

JOSE DIAZ and ENILDA DIAZ, His Wife, *et al.*,

*Intervening Parties Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## BRIEF OF THE COUNCIL FOR AMERICAN PRIVATE EDUCATION, AMICUS CURIAE

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*Appellants,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## BRIEF OF THE COUNCIL FOR AMERICAN PRIVATE EDUCATION, AMICUS CURIAE

## INTRODUCTORY STATEMENT

The pertinent Pennsylvania constitutional and statutory provisions, the pertinent provisions of the United

States Constitution, and the opinion of the court below, are set out in the briefs by the appellants, the appellees and the intervening parties appellees. This *amicus* accepts them for purposes of its own brief. The facts of record in this case and issues raised on appeal are set out in the brief of the intervening appellee, Jose Diaz, et al., and this *amicus* accepts them for purposes of its own brief. All parties have consented in writing to the filing of this brief *amicus curiae* by the Council for American Private Education (hereinafter CAPE).

## THE INTEREST OF THIS AMICUS

CAPE is a nonprofit corporation organized "to assist and strengthen the efforts of the organizations constituting the corporation's membership and the private schools represented by such organizations to serve effectively the free society from which they derive their independence." As its members, CAPE has nine national organizations which operate or serve private elementary and secondary schools throughout the United States (approximately 12,000 schools enrolling 5,000,000 students). The members of CAPE are: American Lutheran Church; Friends Council on Education; Lutheran Church-Missouri Synod, Board of Parish Education; National Association of Episcopal Schools; National Association of Independent Schools; National Catholic Educational Association; National Society for Hebrew Day Schools; National Union of Christian Schools; and United States Catholic Conference.

While the contribution of American private education can remain viable within the framework of the 1971



and 1973 school decisions of this Court, it cannot play an effective role in our national life if the position urged upon this Court by the appellants becomes the law of the land. If the appellants are correct in their interpretation of the First Amendment, that amendment would be much more than a wall of separation between Church and State. The amendment would be an impenetrable barrier between government and the parents and children who exercise their constitutionally protected right to attend private elementary and secondary schools. Fifty years ago this Court unanimously recognized the extraordinary importance of these schools and protected them against those who would have destroyed them outright in the name of Americanism. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court is now confronted with an indirect attempt to destroy them by cutting off their students and the parents of those students from secular, neutral and non-ideological services, materials and equipment like those provided by Pennsylvania in this case to every school child, regardless of the school he attends.

Appellants charge in their brief that "the common motivating attitude" behind the search by Pennsylvania, Ohio, New York and other states for a constitutionally acceptable form of assistance to the secular education of children attending private schools is that "the Establishment Clause is a necessary evil." (Brief for Appellants, p. 10.) Apparently, they find something sinister in the good-faith attempt by these legislatures to comply with the guidelines which this Court has evolved in a series of cases beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). If acceptance of the decisions of this Court is the test of adherence

to the No Establishment Clause, it is appellants, not appellees, who must be found wanting since they now call upon the Court to overrule its decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). (Brief for Appellants, pp. 20-23.)

CAPE respectfully suggests to this Court that the ideological differences between appellants and appellees are manifestly much broader and deeper than a disagreement about the limits which the No Establishment Clause imposes upon government aid to private school children and parents. These controversies are not pure questions of constitutional law. They involve radically different visions of the role that government should play in influencing the choice of parents between private and public schools. The forces represented by the appellants are deeply and publicly committed to putting governing weight exclusively on the side of the public schools, and are attempting to use the No Establishment Clause as a bulwark against what they regard as the seduction of private education. Appellants have consistently cast their challenges to programs of assistance for private school children and parents as though the only issue were the establishment of a church. These controversies, however, involve far more than that. They involve the "establishment" of public schools and their value system in the classical sense of "establishment"; the unique institution receiving exclusive government endorsement and support.

CAPE has no controversy with the public schools, with which it is happy to join in the education of American children. But CAPE, which is committed to the preservation of the rightful role of private education in American life, clearly has a controversy with



appellants. It is for that reason that CAPE submits this brief *amicus*.

## ARGUMENT

### I.

### THE PENNSYLVANIA LAWS HERE IN QUESTION ARE CONSTITUTIONAL UNDER THE NO ESTABLISHMENT GUIDELINES ANNOUNCED BY THIS COURT IN THE AID-TO-EDUCATION CASES DECIDED IN 1971 AND 1973.

As the briefs of the appellees and the intervening parties appellees show, the Pennsylvania statutes here in question are fully constitutional under the guidelines established by this Court in 1971 and 1973.[1] This *amicus* is in substantial agreement with the appellees' arguments, and sees no reason to burden the Court with a summary, much less a repetition, of those arguments.

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[1] *Lemon v. Kurtzman* (consolidated with *Earley v. DiCenso*), 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Norwood v. Harrison*, 413 U.S. 455 (1973).

## II.

**THE 1971-73 GUIDELINES SHOULD BE REEXAMINED AND CLARIFIED IN ORDER TO ACHIEVE A BALANCE BETWEEN THE NO ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE THAT WILL BE IN BETTER HARMONY WITH (1) THE HISTORICAL PURPOSE OF THE FIRST AMENDMENT, (2) THE TRADITIONAL PRACTICAL IMPLEMENTATION OF THAT AMENDMENT, (3) PARENTAL AND STUDENT RIGHTS IN EDUCATION, AND (4) ACADEMIC PLURALISM IN AMERICAN EDUCATION.**

This *amicus* urges the Court to affirm the constitutionality of the Pennsylvania statutes here challenged. Because of the uncertainty and confusion that surround the 1971-73 guidelines in the state and lower federal courts and in the national and state legislatures, the Court should reexamine and clarify the guidelines to bring them into greater constitutional harmony with:

(1) the historical purpose of the First Amendment;

(2) the traditional practical implementation of that Amendment;

(3) parental and student rights in education; and

(4) academic pluralism in American education.

### Historical Purpose

The controlling decisions of this Court and the historical scholarship relied upon therein make it clear



that the No Establishment Clause was meant to prevent more than just Congressional establishment of a single national church, just as the Free Exercise Clause was meant to prevent more than just Congressional prohibition of the practice of the Catholic or Jewish religion. To the extent, however, that the original understanding of the First Amendment influences this Court in determining the application of the Religion Clauses today, it is altogether clear that the original understanding of the First Amendment is decisively in favor of the constitutionality of the Pennsylvania statutes involved in this case.

The first Congresses, which contained many members who participated in drafting, proposing and urging the ratification of the Bill of Rights, saw no inconsistency between the Religion Clauses and federal support of education, including religious education. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." These words are first found in the Northwest Ordinance of 1787, and therefore antedate the Bill of Rights by four years. The same Congress that proposed the First Amendment in 1789 reenacted the Northwest Ordinance of 1787 with the above quoted language.[2] Additionally, subsequent Congresses under the Constitution and Bill of Rights repeatedly incorporated the same language in subsequent ordinances enacted in

[2] *Journals of Congress* (1823 ed) IV, 753: readopted by the First Congress of the United States, Statutes of 1789, c.8 (Aug. 7, 1789).

1800, 1802, 1809, 1818 and 1819.[3] As Isaac Cornelison aptly remarked as long ago as 1895:

> "In view of these facts, it can hardly be held that the founders of our government intended to produce an entire separation of the religion of the people from their civil institutions, and it would be preposterous to assume that they had done what they intended not to do."[4]

The decisions of this Court, starting with *Everson* in 1947, have developed the constitutional principle that government cannot foster or subsidize religion in elementary and secondary schools, be they public or private.[5] This principle is based on post Civil War historical developments that occurred long after the Bill of Rights was adopted. This *amicus* urges the Court, in its reexamination and clarification of No Establishment Clause guidelines, to affirm emphatically that it was never the historical purpose of the First Amendment to bar the states from providing secular, neutral and non-ideological services, equipment and supplies to any

[3] Cornelison, *The Relation of Religion to Civil Government in the United States of America* 112 (1895). Antieau, *Freedom From Federal Establishment* (1963). For other, more recent, scholarly works that illuminate the inadequacy of the historical analysis in the various *Everson* opinions, see Howe, *The Garden and the Wilderness* (1965); Smith, *Religious Liberty in the United States* (1972); and Morgan, *The Supreme Court and Religion* (1972).

[4] *Op. cit.* Cornelison, supra, n. 3, at 120.

[5] *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); and the cases cited *supra*, n. 1, p. 5.



school children. When a state attempts, as Pennsylvania has, to accommodate parental and student rights by providing the same secular services and materials to all students, regardless of the school they attend, government neutrality towards all religions and religious liberty for all individuals is fully preserved—a result wholly in accord with the historical purpose of the First Amendment.

Appellants stress that the legislation before the Court reflects an attitude that the No Establishment Clause is "a necessary evil". The difficulty with this assertion is that appellants equate the First Amendment with the No Establishment Clause and thus fail to appreciate the attitude of those responsible for the adoption of the First Amendment as well as the motives of the Pennsylvania legislature.

While appellants speak of religious freedom they fail to consider that the generation formulating the First Amendment wrote it to contain both an Establishment Clause and a Free Exercise Clause. Their common understanding was that religion as such should neither be subsidized nor impaired by governmental action.[6] Thus, in 1789 and at the time of the *Schempp* and *Walz* cases the norm was one of government neutrality and accommodation of religion within the limits of neutrality.

We submit that the Free Exercise Clause of the First Amendment is coequal with the Establishment Clause and that together they project a juridical philosophy of religious liberty.

[6] Antieau, *Freedom From Federal Establishment* (1963), p. 160.

This was the position of James Madison in the First Congress. It is fair to assume that Mr. Madison's first recommendation concerning a constitutional amendment for religious liberty was a constitutional synthesis of his thinking on the subject, reflecting both Virginia's Bill for Religious Liberty and the Memorial and Remonstrance. On June 8, 1789, James Madison rose in the House and stated:

> "The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these . . . Fourthly, that in Article 1st, Section 9, between clauses 3 and 4 to be inserted these clauses, 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full equal right of conscience in any manner or on any pretext be infringed.' "[7]

Madison placed great stress on the proposition that civil rights should not be abridged on account of religious belief. This is involved in the issues before this Court. Appellants doctrinaire interpretation of the No Establishment Clause would deprive students and parents of the opportunity of participating in basic public welfare legislation especially because of their religious affiliation or association with the schools. Moreover, children attending private schools without any particular religious affiliation are especially penalized. In short, the Commonwealth of Pennsylvania has acted in the Madisonian tradition of the First Amendment, being prompted particularly by religious liberty considerations in the context of preserving a

[7] *Annals of Congress I*, pp. 433-434.



viable parental liberty in the area of education. The brief historical recitation confirms the conclusion that the framers, including Madison, never intended the First Amendment to bar Pennsylvania from providing the public welfare benefits of secular, neutral and non-ideological services, materials and equipment to all children.

**Practical Implementation**

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court sustained the constitutionality of the traditional inclusion of houses of worship in the group of organizations exempted from the real property tax. After noting the "considerable internal inconsistency" in the earlier Religion Clause decisions of this Court, Chief Justice Burger observed:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (397 U.S. at 669.)

The history of church-state relationships in the United States shows that property tax exemptions are far from the only instance of "room for play in the

joints" and of "benevolent neutrality." It is precisely the multiplicity of the instances of "benevolent neutrality" that makes it impossible for the course of constitutional neutrality to be an absolutely straight line. Neither the No Establishment Clause nor the Free Exercise Clause has been implemented in a doctrinaire manner. Chaplains are provided at public expense for persons in the armed forces, public hospitals and prisons. In the field of social welfare, the examples of cooperation among federal, state and private (including church-related) organizations are legion. Many state and federal laws create exemptions to accommodate various religious beliefs and practices. This Court itself has held that, in light of our traditional implementation of both Religion Clauses of the First Amendment, certain exemptions from general secular laws are mandatory.[8]

Specifically, in the field of elementary and secondary education our nation has demonstrated the same determination to avoid ideological extremes and to achieve practical religious neutrality and freedom. Private schools, including church-related institutions, enjoy the same tax exemptions and basic municipal services as public schools. This Court has explicitly sustained the constitutionality of providing safe transportation and secular textbooks to all school children,

[8] *Jones v. Opelika*, 316 U.S. 584, (1942), reversed on rehearing, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Of course, not all exemptions are mandatory: *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961). Only one, however, has been held forbidden: the New York income tax "adjustment" in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).



public and private. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968). And in *Lemon v. Kurtzman, supra,* in which this Court struck down the Pennsylvania purchase-of-services program and the Rhode Island teachers' salary supplements, this Court was also careful explicitly to reaffirm the constitutionality of general transportation and textbook programs and, more generally, of "secular, neutral or non-ideological services, facilities or materials . . . supplied in common to all students." 403 U.S. 602, 616 (1971).

The question now before the Court is whether the services, books, materials, and equipment made available by the Pennsylvania statutes here in question fit within the guidelines of generality and secularity established in the *Lemon* case. We think it manifest that they do, and will not burden the Court by repeating the arguments ably presented to this effect in the briefs of the various appellees. This Court should declare that these Pennsylvania statutes are in the mainstream of the American practical implementation and accommodation of the Religion Clauses of the First Amendment.

**Parental and Student Rights**

From the viewpoint of parents and students, one of the most confusing aspects of the school-aid decisions of 1971 and 1973 was the Court's failure to consider the non-religious dimension of *parental* and *student* rights. The *Lemon, Nyquist* and *Levitt* cases treat the choice of a non-public school as if it were simply the free exercise of religion. There is, however, something equally fundamental at stake: basic civil rights, namely,

the parental and academic rights vindicated by this Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v Society of Sisters*, 268 U.S. 510 (1925), and *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943).

Among the schools operated or served by the membership of this *amicus*, there are numerous institutions that make no religious demands whatever on the students or parents. Moreover, it has been abundantly clear that, for many years, especially in the inner city areas, there are many parents who choose church-related, nonpublic schools for secular, not sectarian, reasons. The basic, nonreligious rights of many parents and students should not be disregarded in the name of No Establishment. An image of the nonpublic school that has been repeatedly represented to this Court is that created by the appellants' "profile." (Brief for Appellants, p.4.) That profile, each element of which appellants claim constitutionally disqualifies every child and parent in the school from general, secular government services (Brief for Appellants, p.18), does not fit many of the schools served or operated by the membership of this *amicus*. Even in those membership schools that do have some elements of the profile the parents and students are seeking far more than religious education. They are exercising the rights guaranteed them by the First and Fourteenth Amendments and recognized by *Meyer*, *Pierce* and *Barnette*.

The exercise of a constitutional right creates no claim to government subsidy for the exercise of that right. *Norwood v Harrison*, 413 U.S. 455 (1973). But extremely serious constitutional questions arise when the exercise of a constitutional right is used as the basis



of withdrawal of general governmental services or facilities from private individuals or groups. This is more true when the constitutional right of freedom of association is used to exclude persons on the basis of their race or color. *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974). It should be, and is, also true in the case of those who exercise their parental, academic, and religious rights in a way which discriminates invidiously against no one.

By choosing to provide all students, regardless of the school they attend, with certain secular services, books, materials, and equipment, Pennsylvania has shown proper recognition of the basic parental and academic rights involved in the choice of a nonpublic school. By circumscribing the assistance provided to these parents and students so as not to transgress the restrictions established by this Court in the *Lemon*, *Sloan*, *Nyquist* and *Levitt* cases, Pennsylvania conformed to the prohibitions of the No Establishment Clause. For this Court to hold the Pennsylvania statutes unconstitutional because *some* schools fit within one or more elements of appellants' "profile" would, in practical effect, be the same thing as holding under this legislation that *no* parents and *no* child attending *any* nonpublic school will receive the secular, general educational services provided by Pennsylvania to all school children. Such a holding would be an extreme penalty on the exercise of the parental and academic rights vindicated by this Court in *Meyer*, *Pierce* and *Barnette*. Moreover, there is nothing in the record to support appellants' suggested "profile", nor that any schools meet all of the asserted characteristics.

**Academic Pluralism**

Twenty years ago this Court recognized the vital role that education plays in our society, and the vital role that public schools play in education. *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Lemon, Sloan, Nyquist* and *Levitt*, as well as in *Everson* and *Allen*, this Court has also recognized the significant contributions of private, including church-related, schools to American education. Unfortunately, however, the main impact of the Court's decisions in the last two decades has been to favor public schools at the expense of private schools. The effect although not the intent of the Court's decisions has been to tilt the economic balance precariously towards a monopoly of elementary and secondary education by governmental institutions.

Private schools, whether church-related or not, have made a significant contribution to pluralism in American education and therefore in the American body politic. If these schools were mere "conduits" to the churches, there would be no constitutional reason to justify even carefully limited legislative efforts to preserve academic pluralism. But, as this Court noted in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), the schools are important conduits to the community at large. Consequently, more than sufficient constitutional justification exists for the government's concern for the continued viability of private schools.

This Court has already ruled in the *Lemon, Sloan, Nyquist*, and *Levitt* cases that, with respect to elementary and secondary schools that have a substantial relationship with a church, the government



cannot subsidize the costs of basic maintenance or instruction. Whatever justification might be found in considerations of academic pluralism for such subsidies has been nullified by the strict interpretations of the No Establishment Clause. Most certainly, however, as this Court has recognized, there is a limit to the logic of the No Establishment Clause. In the present case, Pennsylvania has extended to private school students and parents only those auxiliary, secular, neutral and non-ideological services, materials, and equipment that Pennsylvania also provides to public school parents and students. If the Constitution forbids Pennsylvania to do so, then the effective contribution of academic pluralism to American society is seriously impaired.

For more than 25 years, this Court has been engaged in the task of constructing suitable guidelines for the legislature to follow in accommodating the competing demands of the No Establishment Clause and the Free Exercise Clause so that the historical purpose of the First Amendment, its traditional implementation, parental and student rights in education, and academic pluralism can all be given their appropriate constitutional weight. The spate of litigation in the last five years is ample proof that the guidelines heretofore enunciated by the Court have not been sufficient to achieve their intended effect. It is for that reason that this *amicus* now turns to the need for reexamination and clarification of the guidelines in this extremely sensitive and important constitutional area.

## III.

## IN PARTICULAR, THE GUIDELINES ON "PRIMARY EFFECT," "POLITICAL ENTANGLEMENT," AND APPLICATION OF "POTENTIAL FOR ESTABLISHMENT" SHOULD BE REEXAMINED AND CLARIFIED.

One of the most remarkable aspects of the church-state decisions by this Court in the last 12 years has been the shifting emphasis in the guidelines. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), was a major attempt to establish a universal test for the No Establishment Clause: the secular purpose and primary secular effect test. The *Schempp* test was applied in 1968 in *Board of Education v. Allen*, 392 U.S. 236 (1968), but two years later the Court found the test inadequate for resolving the tax exemption issue in *Walz v. Tax Commission*, 397 U.S. 664 (1970). As the Court emphasized in *Walz*, considerable attention must also be paid to our historical traditions in applying the strictures of the No Establishment Clause. Moreover, in assessing the present constitutionality of continuing such traditions, considerable weight must be given to the question whether a particular tradition enhances or minimizes administrative entanglement between government and the churches.

One year later, however, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), relying on *Walz*, the Court found it necessary to add more elements: the "potential for establishment" and "political divisiveness." Under the first of those elements it was not sufficient for a



program to avoid any actual establishment of religion; it was also necessary for the program to avoid any significant potential for establishment. The second element in 1971, "political divisiveness," was incorporated by the Court into the concept of "entanglement."

As a result of these decisions, the 1973 aid-to-education cases were argued in terms of a three-pronged test against actual or potential establishment: secular purpose, primary secular effect, and entanglement, both administrative and political. The actual decisions, however, in *Sloan v. Lemon*, 413 U.S. 825 (1973) and the two PEARL cases, *Nyquist* and *Levitt*, 413 U.S. 756,472 (1973), made a most significant change in the "primary effect" test. The question was no longer whether the statutes, as in the *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961), had a dominant secular effect, but whether the statute had "the direct and substantial advancement of religion." *Committee for Public Education v. Nyquist*, 413 U.S. at 783, n. 39.

This constant reformulation by the Court of the No Establishment guidelines suggests the Court's continuing concern with the results that the previously announced guidelines would have produced in certain of the cases. And yet, the Court has consistently and wisely refused to accept the simplistic guideline which has been urged upon this Court by some of the appellants ever since 1947: that *any* resulting aid to religion renders a statute unconstitutional. As Mr. Justice Powell stated for the Court in *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973):

> "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution

> with a religious affiliation has consistently been rejected. (citations omitted.) Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

The complexity of the guidelines established by the Court and their somewhat erratic application by the Court has caused considerable confusion in the national and state legislatures and in the state and lower federal courts. The Court itself warned in the 1973 aid-to-education cases that the present guidelines "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. at 741. Obviously, there is a need for greater clarity, reliability and predictability.

The complexity of the traditional relationships between religion and government in our country requires, as the Court has held and we agree, a complex set of guidelines to ensure the preservation of the No Establishment Clause, the Free Exercise Clause, and the "play in the joints" between the two clauses. It does not follow, however, that the guidelines must be so imprecise that in their application no one can be sure until this Court announces its decision how a particular case will be resolved. Some uncertainty in constitutional law is inevitable, but not as much as confronts legislatures today.

This case provides the Court with an opportunity to settle the law clearly, not only with respect to the statutes directly in question, but with respect to the basic principle that individual children and parents do not lose their right to share in public educational programs that are made generally available to all



students and parents, that are truly secular, and that are not capable of being diverted into programs of direct or indirect financial assistance for the costs of basic maintenance and basic instruction in church-related elementary and secondary schools. In this case, the Court should clearly reaffirm what it said in *Lemon v. Kurtzman*: that participation by private school students, including those attending church-related schools, in generally available busing, textbook and lunch programs, and in other generally available, secular, neutral and nonideological services, facilities and materials, does not offend the No Establishment Clause.

To make this reaffirmation, the Court does not necessarily have to retract anything it said in *Sloan*, *Nyquist*, or *Levitt*. Nevertheless, it would be helpful if the Court would reexamine and clarify some of the tests that have been causing considerable confusion. These points include the "primary effect" test, the "entanglement" test, and the "potential for establishment" test.

In refusing to make the "metaphysical judgment" about whether the secular or the religious benefit was greater in the *Nyquist* case, this Court seemed to substitute a negative test (no substantial advancement of religion) for the positive test (primary, religiously neutral, secular effect) of the *Schempp* case. But the judgment about what substantially advances religion is frequently at least as "metaphysical" as the judgment whether a particular law advances the secular interests of society more or less than the religious interests of society. In some cases, as in *Schempp*, the advancement of religion may be so palpably the purpose and effect of the legislation that there is no room for doubt. But

in many cases, and especially in those in which there is no doubt of the secularity of the legislature's purpose, the estimate of how much, if any, benefit will accrue to religion from the legislation will be exceedingly difficult, if not impossible, to make.

This Court has never held itself out as an expert on philosophy, theology, or religion. See *Roe v. Wade*, 410 U.S. 113 (1973). This Court should not, except in the most glaring cases, make the constitutionality of secularly motivated legislation turn on whether the effect on "religion" is "substantial and direct" or "remote and incidental." Such tests were once used to limit the power of the federal and state governments in the field of interstate commerce, but have long since been abandoned as inadequate for the task for which they were constructed. The tests are just as inadequate in the area of the complex relationships of religion and American society.

The "entanglement" test also needs reexamination and clarification. While there can be no doubt that excessive "administrative" entanglement is inconsistent with the basic purpose of the No Establishment Clause to separate purely religious concerns from governmental scrutiny, supervision and control, the doctrine of "political entanglement or divisiveness" is at war not only with the Religion Clauses but with all the other clauses in the First Amendment and the entire framework of the Constitution. The Court should consider the fact that it developed this doctrine in *Lemon v. Kurtzman* without any necessity and without any historical or legal foundation. Organized religion



has always been,[9] is now, and forever will be a voice in American political discussions. Serious consideration of the implications of this doctrine will convince this Court that the doctrine of "political entanglement" must be banished as totally inconsistent with our history and the political guarantees of the First Amendment. It is not wholesome neutrality, but hostility, to attempt to silence the churches on matters of vital public concern. If this can be done for churches it can readily be done for other groups.

Finally, this Court should reexamine and clarify the "potential for establishment" test that was first announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This doctrine is being interpreted by some of the lower federal and by some of the state courts as though the slightest possibility of a violation of the Establishment Clause were sufficient to invalidate an entire legislative program. There is no way to eliminate the *possibility* of the abuse of power, money, sex, or education. When the actual record of a case demonstrates, as the record in this case does, that there has been no abuse, present legislation should not be annulled because somebody *could* abuse it. Anything can be abused, even powers of government.

In urging this Court once more to reexamine and clarify the guidelines for the Religion Clauses of the First Amendment, this *amicus* recognizes that it is asking the Court to make still another shift in the guidelines after there have already been so many.

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[9] See an excellent discussion in Strout, *The New Heaven and New Earth: Political Religion in America.* (1974).

Nevertheless, this *amicus* urges the Court, now that it has decided the unconstitutionality of government subsidies to church-related schools for the costs of their basic maintenance and instruction, to resolve with equal firmness the constitutionality of the participation of all school children in programs that provide secular auxiliary services, books, materials, and equipment. To decide this second proposition, the Court need only reaffirm what it has already said on the subject in *Lemon v. Kurtzman.* But it will be of inestimable benefit to the future of government neutrality, religious freedom, and private education if the Court re-invigorates the "play in the joints" that has been endangered by exaggerated applications of certain of the guidelines announced in *Sloan, Nyquist,* and *Levitt.*

## CONCLUSION

The Constitution is a deliberately concise document. To treat the Constitution as if it contained a definitive requirement or prohibition on all the manifold relationships of government and education or government and religion is to make precisely the same mistake the Court made in *Lochner v. New York*, 198 U.S. 45 (1905). It is just as wrong for the appellants to urge this Court to use the No Establishment Clause to write the appellants' predilections and philosophies about education into the First Amendment as it was for businessmen to urge the Court to write laissez-faire into the Due Process Clause.

The Religion Clauses put definite limits on what the states and the federal government may do in the area of



religion and society; but those limits are at the *outer boundaries* of the social arena in which both government and religion must function. Within these outer constitutional boundaries, there is considerable room for "play in the joints." Any other interpretation of the Religion Clauses converts them into precisely what the Constitution is not: a detailed code containing the answer to every conceivable legal question.

For these reasons, this *amicus* respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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